Supreme Court, U.S.
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No. 98-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ALBERT COOK AND MICHAEL COOK,

Petitioners,

v.

ALEXIS HERMAN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

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34 pp

QUESTIONS PRESENTED.

I. Should the Petitioners have been denied a jury trial in an action brought by the Department of Labor in which said Department of Labor sought criminal sanctions which were subsequently granted without a hearing against the Petitioners?

II. Did the Department of Labor exceed its authority and usurp the constitutional power of Congress to pass legislation by determining that "withheld wages" were "plan assets" long after Congress had given the Department of Labor until December 31, 1986 to determine what constituted "plan assets"?

III. Did not Justice Dorsey's opinion demonstrate such bias and prejudice (previously undisclosed by Justice Dorsey) against the Petitioners that fairness and justice required that he should have recused himself?

IV. Does not the decision of Justice Dorsey and the affirmation of his decision by the Court of Appeals mean that contrary to existing law that officers of a corporation are liable for the acts and omissions of said corporation?

V. Did Petitioners received due process as is their right when Justice Dorsey denied them an opportunity to be heard or present witnesses and granted Respondent's Motion for Summary Judgment?

LIST OF PARTIES.

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OPINIONS BELOW.

The opinion of Justice Dorsey of the United States District Court appears at Appendix A and is unpublished.

The opinion of the United States Court of Appeals for the Second Circuit appears at Appendix B and is unpublished.

JURISDICTION.

The date on which the United States Court of Appeals decided this case was May 12, 1998.

No petition for rehearing was timely filed in this case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This case arises from Respondent's action against the Petitioners pursuant to the provisions found in Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, as amended and as enforced pursuant to the provisions contained in 29 U.S.C. §§ 1132(a)(2) and (5).

Because of the criminal sanctions sought by the Respondent in their complaint, Petitioners sought a jury trial as was their right pursuant to the provisions contained in the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE.

Respondent commenced this action against the Petitioners on March 10, 1995 claiming that the Petitioners as President and Treasurer of the Products Design and Manufacturing were personally responsible and liable for approximately $10,000.00 in withheld wages that were not turned over to the 401K plan trustee, "Equitable Insurance".

Petitioners were turnaround consultants and in August, 1991 became officers of Products Design and Manufacturing Co., Inc., a Connecticut corporation. "Products" was a *de facto* bankrupt company in August, 1991. The following evidence in the form of affidavits was provided to Justice Dorsey in Respondent's Motion for Summary Judgment but considered by Justice Dorsey as self serving and only allegations:

1. There was sufficient money ($12,500) held by "Equitable" belonging to the said employees that exceeded any money not contributed to the plan, but "Equitable" instead of turning the money over to the employees stopped payment on the check and turned it over to the Assignee ("Products" did an Assignment for the Benefit of Creditors in November, 1992).

2. Petitioner, Albert Cook, instructed "Equitable's" agent, Mocabee, to terminate the Plan in September, 1991, but he failed to do so until April, 1992.

3. "Products" controller, Debbie Walters, had full discretion on what money to pay and since the 401K plan pre-dated Petitioners' and Walter's involvement with "Products", neither had first hand experience on how to terminate a plan.

4. During her tenure, Debbie Walters reimbursed several employees money inad-

vertently withheld from their pay instead of forwarding it to "Equitable".

5. Several months after Debbie Walters left "Products" employ and during the period that "Products" was under the control of the Assignee, Respondent did an audit of the computerized payroll records and came up with a figure of about $11,000.00 owed to employees, although they have only been able to prove by affidavit about $4,000.00 still owed to employees.

Without a hearing, Justice Dorsey dismissed Petitioners' Motion to Implead Equitable as the responsible party since they held more than enough money to compensate any employees whom were inadvertently not paid.

None of the employees nor the Respondent have sought to access the bonding company, Peerless Insurance, which fully covered the petitioners and any other employees of "Products" for any misappropriation of funds.

Respondent's original complaint alleged that Petitioners used the withheld money for their own or "Products" benefit, it was never proven.

Justice Dorsey's vituperative language in his decision demonstrated his prejudice which was unknown or demonstrated before, although it did seem strange to Petitioners that Respondent was granted several extensions of time without a hearing and in some cases without notification to the Petitioners to allow Respondent to file their Motion for Summary Judgment long after the prescribed deadline.

Justice Dorsey's ruling was clearly a compromise since it granted a Summary Judgment in Petitioner's favor as to the medical claim of $5,000.00 for "Klein", one of, "Products" employees.

Justice Dorsey's ruling that Petitioners be "permanently enjoined from violating the provisions of Title I of ERISA or *acting as fiduciaries to any employee* benefit plan covered by ERISA" is a criminal sanction and as such violates Petitioners' right to a jury trial and due process.

The Second Circuit Court of Appeals on May 12, 1998 affirmed Justice Dorsey's ruling.

REASONS FOR GRANTING THE WRIT.

Petitioners ask this Honorable Court to grant their petition for a Writ of Certiorari for the following reasons:

1. Petitioners have been denied due process and only this Writ can restore their rights pursuant to the provisions of the Fourteenth Amendment of the United States Constitution;

2. To allow the lower courts' rulings to stand would be a grave injustice and require officers of a corporation to be liable for the acts and omissions of their corporate employer.

3. To allow the lower courts' rulings to stand would allow the Executive Branch

(Department of Labor, Respondent) to usurp the power of Congress to legislate.

CONCLUSION.

The Petition for a Writ of Certiorari should therefor be granted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT B. REICH, Secretary of Labor, United States Department of Labor,	:	
Plaintiff,	:	
-vs-	:	Civil No. 3:94cv2069 (PCD)
ALBERT COOK and MICHAEL COOK,	:	
Defendants.	:	

RULING ON MOTION FOR SUMMARY JUDGMENT

Plaintiff Robert B. Reich, Secretary of Labor, United States Department of Labor (the "Secretary") moves for summary judgment on its Complaint against Defendants Albert Cook and Michael Cook ("Defendants") for breach of fiduciary duty in violation of the Employee Retirement Income Security Act ("ERISA"). For the following reasons, the Secretary's motion is GRANTED IN PART AND DENIED IN PART.

I. BACKGROUND

Defendants were officers and directors of Products Design and Manufacturing Corporation ("Products"), a now defunct

corporation.[1] Albert Cook was the President, his son, Michael Cook, was the Treasurer, and both Cooks served as directors. Products sponsored the Products Design and Manufacturing Corporation Employee Savings and Protection Plan (the "401(k) Plan") and the Products Design and Manufacturing Corporation Group Health Plan (the "Health Plan").

Employees who chose to participate in the 401(k) Plan could make voluntary contributions by having a percentage of their weekly paycheck deposited in their individual 401(k) accounts. The Health Plan was funded, for health insurance premiums, by employee payroll deductions and by employer contributions.

Products was formerly owned by Thomas Weileba ("Weileba"). On August 6, 1991, the company was sold to the Barlow Manufacturing Group ("Barlow"). Defendants were officers and directors of Barlow. Barlow was owned by the Cook Family Trust, of which Albert Cook was the trustee, and Michael Cook was a beneficiary. Defendants were informed of Products' employee benefit plans. Deposition of Albert Cook ("A. Cook Depo.") at 82-83.

Products was the Plan Administrator and the named fiduciary administering and managing the 401(k) Plan. Barclay Group, Inc. ("Barclay") assisted with the Plan's record keeping requirements. The Plan asset were held by Frontier Trust (the "Trustee"). Pursuant to the Trust Agreement, the employer's payments were made to the Trustee, which in-

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[1] Defendants' Statement of Material Facts does not comply with L.R. 9(c). Defendants do not admit nor deny the facts contained in the Secretary's Statement of Material Facts, but instead, make conclusory factual allegations and legal arguments, at times in the form of questions. Any facts not specifically disputed by Defendants are deemed admitted. L.R. 9(c).

vested the assets with The Equitable Life Assurance Society ("Equitable").[2]

Products also sponsored the Health Plan and was responsible for paying all claims up to a specified amount. Diversified Group Brokerage Corporation ("Diversified") was the Third Party Administrator for the Health Plan. Pursuant to its agreement, Diversified had no discretionary authority or control over the management of the fund. Diversified received and processed all medical claims and sent Products a monthly statement regarding the claims and the amount required from Products to fund payment of the claims. With the funds from Products, Diversified paid the claims.[3]

Between August 1991 and August 1992, Products paid approximately $250,000 each month for payroll, utilities, mortgage, lease and materials. A. Cook Depo. at 172-73; Deposition of Michael Cook ("M. Cook Depo.") at 27-29. Products was having financial difficulties and paid bills "by mandate" – it paid the bills that it felt were necessary, including payroll and utilities – but did not make payments that "could be issued at the discretion of Products." M. Cook Depo. at 50.

Deductions for employees' contributions to the 401(k) Plan continued uninterrupted from the time Defendants took control of Products until approximately April 1992. A.

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[2] Equitable prepared the required Summary Plan Descriptions ("SPD"). Michael Cook signed the approval form for the SPD to be distributed to participants in November 1991. Affidavit of Arthur W. Mocabee, Jr. ("Mocabee Aff.") ¶ 5; Exh. B to Mocabee Aff.

[3] Products also maintained stop loss and life insurance policies associated with the Health Plan. The stop loss policy covered claims beyond the amount of Products' responsibility. Diversified billed Products monthly for the premiums.

Cook's Responses to Request for Admissions, No. 18 (Exh. A to memorandum in support of motion for summary judgment). However, after August 1991, Products stopped reporting employee data, including monthly statements of amounts withheld from participants' paychecks, to the 401(k) Plan record keeper. Mocabee Aff. ¶ 13. Products stopped remitting 401(k) Plan employee contributions to the Trustee. Id.[4]

Employee contributions to the 401(k) Plan from November 1991 through April 1992 were never deposited with the 401(k) Plan Trustee.[5] A check for the September 1991 contributions, dated January 30, 1992, was signed by Albert Cook. A check for the October contributions, dated March 13, 1992, was signed by Michael Cook. Michael Cook told Equitable employee Arthur Mocabee, Jr. ("Mocabee") that Products would make "catch-up" contributions to the 401(k)

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[4] Equitable informed Defendants of Products' responsibilities and their noncompliance with the plans. Mocabee Aff. ¶ 16; Exh. D. to Mocabee Aff.

[5] In Defendants' memorandum in opposition ("memo. opp.") they deny that they failed to deposit these monies with the Plan. Defendants do not deny that the money was not deposited but only that they had no responsibility to do so. Memo. opp., p.2. Throughout Defendants' memo. opp. they make conclusory allegations and bare denials of the facts set forth in the Secretary's motion for summary judgment – Defendants do not set forth any specific facts or offer any supporting evidence. Argument and opinion does not raise a genuine issue of material fact sufficient to defeat a properly supported summary judgment motion.

Defendants also go on at length regarding the ownership, financial status and financing for the purchase of Products. These facts are not material to the resolution of the Secretary's motion for summary judgment.

Plan to make up for deductions from employee paychecks which had not been transferred to the Trustee. Mocabee Aff. ¶ 17; M. Cook Depo. at 95-96.

On or about April 1, 1992, 401(k) Plan participants requested that payroll deductions for Plan contributions be suspended. Shortly thereafter, Products stopped withholding monies from employees. Michael Cook signed the suspension authorization forms on behalf of Products. Exh. G. to Mocabee Aff. The Plan was terminated in 1993, pursuant to Albert Cook's authorization. Exh. I to Mocabee Aff.

After August 1991, Products stopped funding the Health Plan and stopped paying related insurance premiums. Affidavit of Duane C. Briskey ("Briskey Aff.") ¶ 7. From on or about August 1, 1991 until November 1991, deductions continued from participants' paychecks for health insurance premiums. A. Cook's Responses to Request for Admissions, No. 30. In November of 1991, Products was informed of the delinquency in payment of those premiums (Briskey Aff. ¶ 7; Exh. C to Briskey Aff.), and that insurance terminated as of August 31, 1991. Id. ¶ 8.[6]

Konrad Klein ("Klein") was an employee of Products until mid-September 1991. Employee health plan contributions were withheld from his paycheck until the last week he worked at Products. Affidavit of Konrad Klein ("Klein Aff.") ¶ 4. Klein was never informed before he left Products' employment that there was any problem with the Health Plan. Id. ¶ 6. Ultimately, his claims for benefits were not paid by

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[6] It is unclear from the record to what extent employees contributions to the Health Plan continued to be withheld from employee's wages. Although deductions apparently continued through November 1991, the Secretary does not seek damages for any unpaid contributions, but instead, only seeks to recover the monies paid by Konrad Klein for health services.

the insurance company since Products' coverage had been terminated due to non-payment of premiums. Michael Cook agreed to pay Klein $500 per month until his medical expenses were paid. Id. ¶ 12; Exh. B to Klein Aff. Klein received one check in the amount of $500. Klein Aff. ¶ 13. He received one more check in the amount of $500, which was returned for insufficient funds. Id. Klein received no other money from Products and paid $4,710.78 in medical bills incurred while he was employed by Products.

II. DISCUSSION

A. Standard of Review

Summary judgment shall be granted when "the pleadings, depositions . . . and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "'Properly employed, summary judgment allows the court to dispose of meritless claims before becoming entrenched in a frivoloous and costly trial.'" Diamantopulos v. Brookside Corp., F. Supp. 322, 325 (D. Conn. 1988) (citing Knight v. U.S. Tire Ins. Co., 804 F.2d 9 (2d Cir. 1986)).

The moving party bears the initial burden of establishing that there is no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). An issue of material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. "If the evidence is merely colorable . . . or is not significantly probative . . . summary judgment may be granted." Id. at 249-50. The issue is "whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail

as a matter of law." Id. at 251-52. A factual issue is "material" if it "might affect the outcome of the suit under the governing law . . . ." Id. at 248.

Once the movant has satisfied its burden, the party opposing summary judgment "'must set forth specific facts showing that there is a genuine issue for trial.'" Id. at 250. The non-movant may not merely rest on the allegations and denials in the pleadings but must establish, via affidavits, depositions, answers to interrogatories and admissions on file, a genuine issue of material fact exists. Id. at 248. In considering this motion, all reasonable inferences are drawn in favor of the nonmoving party. Id. at 255. The court is not to weigh the evidence and determine the truth of the matter, but instead, is solely to consider whether there is a genuine issue for trial. Id. at 249.

B. Who is a Fiduciary

A person is a fiduciary of an ERISA plan "to the extent (I) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . or (ii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A)(I),(iii).[7]

The Secretary alleges that Defendants were fiduciaries for both plans because: (1) they exercised exclusive control over the management and disposition of the plan assets; and (2) they exercised discretionary authority, control and/or respon-

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[7] If there is no dispute as to the facts, the question of whether one is a fiduciary is a question of law for the court. Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1458 (9th Cir. 1995), cert. denied, 116 S. Ct. 301 (1995).

sibility respecting the management and administration of the plans.

1. Plan Assets

Defendants contend that the monies withheld from the employees' paychecks were not plan assets until they were actually deposited with the plans and, therefore, they did not exercise control over any "plan assets." Employee contributions withheld from employee paychecks are "plan assets" subject to ERISA even if those contributions are not turned over to the plan. U.S. v. Grizzle, 933 F.2d 943, 947 (11th Cir. 1991), cert. denied, 502 US. 897 (1991). "There is no basis for concluding that a fiduciary can escape liability for misusing plan assets by diverting or permitting diversion of employee contributions before they reach the investment account." Pension Ben. Guar. Corp. v. Solmsen, 671 F. Supp. 938, 946 (E.D.N.Y. 1987).

The Department of Labor clarified that "plan assets" include employee contributions. Grizzle, 933 F.2d at 947 (citing 29 C.F.R. § 2510.3-102 (1989)). "Plan assets" are defined as:

> "amounts . . . that a participant or beneficiary pays to an employer, or amounts that a participant has withheld from his wages by an employer, for contribution to the plan as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets, not to exceed 90 days from the date on which such amounts . . . would otherwise have been payable to the participant in cash (in the case of amounts

> withheld by an employer from a participant's wages)."

29 C.F.R. § 2510.3-102(a)(1989) (emphasis added). To the extent Defendants exercised any authority or control respecting the management or disposition of those assets, they were fiduciaries. Defendants were also fiduciaries to the extent they exercised any discretionary authority, control or responsibility respecting the management or administration of the plans.

2. *Discretion and Control*

"Congress intended the term [fiduciary] to be broadly construed." Blatt v. Marshall and Lassman, 812 F.2d 810, 810 (2d Cir. 1987). ERISA requires every plan to have "at least one named fiduciary who has authority to control and manage the operation and administration of the plan." Jensen v. Sipco, Inc., 867 F. Supp. 1384, 1394 (N.D. Iowa 1993) (citing 29 U.S.C. § 1102(a)(1)), aff'd, 38 F.3d 945, cert. denied, 115 S. Ct. 1428 (1995). Accord, 29 C.F.R. § 2509.75-8 ("[e]ach plan must . . . have at lease one named fiduciary who serves as plan administrator . . ."). However, whether one is a fiduciary is determined by the functions they perform, rather than the title that they hold. Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1459 (9th Cir. 1995); Parker v. Bain, 68 F.3d 1131, 1139 (9th Cir. 1995) (citations omitted).

One "who performs purely 'ministerial' functions for a benefit plan is not a fiduciary." Blatt, 812 F.2d at 812 (citing 29 C.F.R. § 2509.75-8). "[M]inisterial functions include the application of rules determining eligibility for participation, calculation of services and benefits, and collection of contri-

butions." Id. (citation omitted). Accord: Singelton v. Bd. of Tr. Of IBEW H. & W. Fund, 815 F. Supp. 448, 450 (N.D. Ga. 1993) (one who performs claims processing, investigations and record keeping is not a fiduciary). However, "[a]ny person who, in fact and practice, exercises discretion over plan assets is a fiduciary." Dardaganis v. Grace Capital, Inc., 664 F. Supp. 105, 112 (S.D.N.Y. 1987), aff'd in part, vacated in part, 889 F.2d 1237 (2d Cir. 1987).

Defendants argue that they are not fiduciaries because Products, the corporation, is the named plan administrator and they were merely acting on behalf of the corporation. Officers and directors of a corporation are not fiduciaries solely due to their positions. They are fiduciaries in their own right as a result of their authority and control:

> "'While it is indeed contemplated under ERISA that a corporation, as an entity, may be a plan fiduciary, the analysis does not end there. Individuals within the corporation who exercise the type of authority or control described in Section 3(21)(A) of ERISA will themselves be fiduciaries.'"

Dardaganis, 664 F. Supp. at. 112 (holding that President and CEO was personally liable as a fiduciary even though the corporation was the named adviser of the plan because he was the person who exercised complete discretion over the disposition of the fund assets) (citations omitted). Accord: Solmsen, 671 F. Supp. at 944-45 (corporate president who signed papers terminating the plan and was responsible for "authorizing and making payments to the Plan" was a fiduciary); McNeese v. Health Plan Marketing, Inc., 647 F. Supp. 981, 984-85 (N.D. Ala. 1986) (President involved in the ad-

ministration of the plan by virtue of his position and who "exercises management over assets, renders investment advice or exercises discretionary administrative control . . ." is a fiduciary).

Products maintained one corporate operating account out of which it paid all monies. Defendants were the only persons at Products with signatory authority on the corporate account. A. Cook Depo. at 177-78; M. Cook Depo. at 48, 54-55, 122.[8] Accordingly, Defendants were the only persons at Products with authority to sign the checks to forward employee contributions and insurance premiums pursuant to the terms of the 401(k) Plan and the Health Plan. Defendants retained signatory authority to monitor and control the corporation's budget. A. Cook Depo. at 178.

Although Defendants were not involved in the day-to-day operation of the company and other employees processed checks for their signature, as the only signatories on the corporate account, Defendants retained the authority to instruct those employees as to what checks to process and what monies were to be paid out. A. Cook Depo. at 169-70; M. Cook Depo. at 52. It was Defendants who ultimately signed the checks to Frontier Trust representing the participant contributions for September and October 1991.[9] Solmsen, 671 F. Supp. at 944 ("[m]ost significantly, defendant was responsible for authorizing and making payments to the Plan"). Accordingly, Defendants exercised authority and control as to the management and disposition of plans' assets and were fiduciaries.

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[8] Defendants testified that they would sometimes delegate authority to others at the company to permit them to sign their names.

[9] Both of these checks were dated after the expiration of the 90 days from the date of withholding.

Defendants also exercised discretionary control and authority over the management and administration of the plans by: (1) signing the suspension authorization forms[10]; (2) signing the approval form on behalf of Products relating to the distribution of the Summary Plan Description; (3) ensuring Equitable that Products would make "catch-up" contributions to the 401(k) Plan; (4) allegedly directing the termination of the 401(k) Plan in September 1991; and (5) ultimately authorizing the termination of the Plan.[11] It was Defendants, as the individuals with authority, who were contacted by Frontier Trust, Equitable and Diversified when issues relating to the 401(k) Plan and Health Plan arose. Accordingly, Defendants retained or exercised discretionary control or authority over the management or administration of the plans and they were fiduciaries.

C. Breach of Fiduciary Duties

Under ERISA, fiduciaries to employee benefit plans are required to: (1) discharge their duties under the plan solely in the interest of the participants; (2) for the exclusive purpose of providing benefits to participants; (3) with the care, skill, prudence, and diligence of a prudent man; and (4) in accordance with the plan documents. 29 U.S.C. § 1104.[12] These

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[10] M. Cook Depo. at 100-03; Exh. 16(a),(b) to M. Cook's Depo.

[11] A. Cook Depo. at 186-90; Exh. 8 to A. Cook Depo. Defendants allege breaches of fiduciary duty on the part of others involved with the plans. Whether co-fiduciaries breached their duties to the plan participants does not alter Defendants' fiduciary status or breaches of their duties.

fiduciary duties include "the fiduciary responsibility under the Plan to make contributions due to it," Solmsen, 671 F. Supp. at 945, and to inform participants in a plan when an employer is not making the required contributions. McNeese, 647 F. Supp. at 985; Eddy v. Colonial Life Insurance Co. of America, 919 F.2d 747, 750 (D.C. Cir. 1990); Solmsen, 671 F. Supp. at 946.

Defendants permitted the continued withholding of monies from employee paychecks for contribution to the 401(k) Plan and the Health Plan, failed to ensure that those monies were deposited with the plans and did not inform plan participants of their failure to make contributions. Instead, those monies remained in the corporate account and were used to pay corporate expenses.[13] The employee contributions were not segregated from the general corporate account. Defendants' use of employee contributions for corporate expenses, rather than for the plans, constitutes a breach of their duty to

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[12] Since Defendants breached their duties under § 1104, the issue of defendants' breach of their fiduciary duties under §§ 1106(a),(b) through self-dealing will not be addressed.

[13] Defendants claim that Products did not have the financial resources to pay the contributions. Financial hardship does not relieve a fiduciary from their responsibility to transfer withheld funds to the plan. Solmsen, 671 F. Supp. at 945. Defendants also claim that the 401(k) Plan was terminated because Albert Cook allegedly told Mocabee at Equitable to terminate it in September 1991. Defendants had a fiduciary responsibility to properly terminate the Plan if they chose and to inform the participants of its status -- they are not relieved of their fiduciary obligations by allegedly directing someone, without meeting any of the legal requirements, to terminate the plans and not following through. Additionally, Defendants were aware that the Plan was still in effect, as evidenced by the two checks that were issued to the 401(k) Plan after they allegedly directed that it be terminated.

act solely in the interest of the participants and with complete loyalty to the participants. Solmsen, 671 F. Supp. at 946.[14]

D. Relief

1. Damages

The Secretary seeks an order requiring Defendants jointly and severally to restore to the 401(k) Plan and/or to the participants and beneficiaries of the Plan, the wages withheld but not deposited to the Plan as a result of Defendants' breach of fiduciary duty, as well as to pay Klein's unpaid claims that should have been paid pursuant to the terms of the Health Plan. The Secretary brought this action pursuant to 29 U.S.C. § 1132(a)(2),[15] (5)[16]. ERISA's civil enforcement provision.

An employee benefit plan fiduciary is liable for "any losses to the plan resulting from each such breach [of fiduci-

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[14] Defendants also breached their fiduciary duty to act in accordance with the Plan documents, which require all wage deferrals to be paid by the employer to the Trustee "as soon as practical, but in no event more than 90 days after the date on which such deferrals were withheld from the participant's compensation." Exh. (A)(1) to Mocabee Aff., p. 18.

[15] Section 502(a)(2) provides that "[a] civil action may be brought -- (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title." 29 U.S.C. § 1132(a)(2).

[16] Section 502(a)(5) provides that "[a] civil action may be brought -- (5) except as otherwise provided in subsection (b) of this section by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (I) to redress such violation or (ii) to enforce any provision of this subchapter.

ary duty]." 29 U.S.C. § 1109. Any recovery in an action under 29 U.S.C. § 1132(a)(2) for a violation of § 409 inures to the plan rather than to the individual or participants. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1984). "Congress did not intend that section [§ 409] to authorize any relief except to the plan itself." Id. Accord: Lee v. Burkhart, 991 F.2d 1004, 1009 (2d Cir. 1993) ("the fiduciary duties imposed by section 409 run to the plan and not to individual beneficiaries") (citation omitted).

The Secretary may seek relief under § 502(a)(5), however, for individuals harmed by a fiduciary's breach of duties. See Varity Corporation v. Howe, 116 S. Ct. 1065 (1996).[17] "[U]ndoubtedly there will be instances in which a fiduciary's actions harm an individual beneficiary, but do not harm the plan . . ." In re Unisys Corp., 57 F.3d 1255, 1267 (3rd Cir. 1995) (quotation and internal citation omitted), cert. denied, 116 S. Ct. 1316 (1996). Section 502(a)(3) authorizes suits for "'appropriate equitable relief' to redress violations of ERISA." Id. "Simply stated, Russell cannot be read to limit a plan participant's or beneficiary's ability to redress a wrong done to him by a breaching fiduciary." Bartucca v. Katy Indus., Inc., 668 F. Supp. 111, 113 (D. Conn. 1987) (citation omitted).[18] Such relief does not include monetary damages, but only equitable remedies. Varity, 116 S. Ct. at 1078; 29

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[17] Varity addressed § 502(a)(3) in a suit brought by the beneficiaries, not the Secretary. Section 502(a)(5) is identical to § 502(a)(3) except that it authorizes suits by the Secretary, rather than beneficiaries and participants.

[18] As recognized in Iwans v. Aetna Life Ins. Corp., 855 F. Supp. 579, 583 (D. Conn. 1994), Bartucca was overruled by Mertens to the extent it held that damages were recoverable under § 1132(a)(3). Iwans, 855 F. Supp. at 584.

U.S.C. § 1132(a)(5)(B). See also Lee, 991 F.2d at 1011; Anweiler v. American Elec. Power Service Corp., 3 F.3d 986, 993 (7th Cir. 1993).

The Secretary claims to be seeking relief on behalf of the 401(k) Plan, not individual employees. The Secretary's Motion for Summary Judgment suggests the contrary. According to Defendants, all Products' business records were lost or destroyed. The only information available reveals that $11,414.38 was withheld from the paychecks of 16 employees during the months of November 1991 through April 1992 -- that is the amount the Secretary seeks to recover.[19] That money was deducted from paychecks of 16 individual employees for contribution to their individual 401(k) Plans to be invested in the manner chosen by each individual employee. The Secretary has not indicated how he plans to disburse these monies and has not petitioned the court for the appointment of a trustee to administer the plan, which no longer exists. Instead, the Secretary is apparently seeking recovery on behalf of the individual employees, not on behalf of the Plan as a whole, which is incognizable under § 502(a)(2).

However, even if the Secretary is seeking recovery on behalf of the individual employees, equitable relief, including restitution, is authorized under § 502(a)(5). Mertens v.

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[19] In discovery, Products produced documents given to John Magnesi, a Wage Enforcement Agent, when he conducted his investigation of the company of behalf of the State of Connecticut. Affidavit of John Magnesi ("Magnesi Aff.") ¶¶ 4, 5. Those documents are based on information gathered from Products' computerized payroll data. Mocabee Aff. ¶ 20. According to those documents, $11,414.38 was withheld from employees' paychecks during the months of November 1991 through April 1992 and was not forwarded to the 401(k) Plan Trustee. Defendants do not dispute that this amount was withheld.

Hewitt Associates, 508 U.S. 248, 260 (1993) ("the 'equitable relief' awardable under § 502(a)(5) includes restitution of ill-gotten plan assets or profits"). See also In re Unisys Corp., 57 F.3d at 1269 (available equitable relief includes restitutionary reimbursement for back benefits). A court has broad discretion when determining the appropriate relief under ERISA. Ruzzo v. Unger, 845 F. Supp. 124, 126 (S.D.N.Y. 1994); Whitfield v. Tomasso, 682 F. Supp. 1287, 1305 (E.D.N.Y. 1988). A court may award such equitable or remedial relief as it deems appropriate . . . ." Iwans v. Aetna Life Ins. Corp., 855 F. Supp. 579, 583 (D. Conn. 1994). The employees who had a percentage of their wages withheld are entitled to have their wages restored. Consistent with the remedial purpose of ERISA, Defendants are liable for the amount of the wages withheld from employee paychecks but never deposited in the 401(k) Plan.

The Secretary also seeks to have Klein's medical expenses reimbursed. This relief does not inure to the benefit of the Health Plan, but instead, is solely for the benefit of Klein. Lee, 991 F.2d at 1011 (holding that action to recover unpaid medical costs covered by plan but not paid due to the bankruptcy of the plan's self-insured sponsor was for the benefit of individual insured, not the plan). Accordingly, Plaintiff may only recover these amounts under § 1132(a)(5). However, the Secretary is requesting money damages, not equitable relief. Lee, 991 F.2d at 1011. As such, the Secretary is not entitled to relief despite Defendants' breach of fiduciary duty, and summary judgment is granted to Defendants on the Secretary's claim for reimbursement of Klein's medical expenses.

2. Interest

"Although an award of prejudgment interest to a prevailing party is not specifically provided for in the statute, a court has 'wide discretion' to award prejudgment interest in cases against fiduciaries under § 1109." Russo, 845 F. Supp. at 126 (citing Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 286 (2d Cir. 1992)). "[A]n award of prejudgment interest is appropriate in cases arising under ERISA . . . [as] a discretionary matter for the court where such award is fair, equitable and necessary to compensate the wronged party fully." Mendes v. Telapers Ins. and Annuity Ass'n, 982 F.2d 783, 790 (2d Cir. 1992) (quotation omitted).

The employees were denied the use of the money that was withheld from their wages but never deposited in their 401(k) accounts. They are entitled to an award of prejudgment interest calculated from the date on which the money was to be deposited in their accounts. The Secretary seeks prejudgment interest under the Internal Revenue Service ("IRS") rate set forth in 26 U.S.C. § 6621. The IRS rate of interest to calculate prejudgment interest is appropriate in cases against fiduciaries under § 1109. Russo, 845 F. Supp. at 126; Whitfield, 682 F. Supp. at 1305.[20]

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[20] The IRS rate is not always appropriate in actions for breach of fiduciary duty. "Prejudgment interest is not intended to penalize the trustee but serves as compensation for the use of money withheld." Diduck, 974 F.2d at 286 (citation omitted). "Hence, such an award must be made with an eye toward putting the plan in the position it would have occupied but for the breach." Id. (citation omitted). "Assessing the appropriate amount of interest requires a comparison of what the plan earned during the time in question and what it would have earned had the money lost due to the breach been available." Id. The Secretary did not address this issue. However, Defendants have not objected to the use of the IRS rate for determining prejudgment interest.

3. Injunctive Relief

The Secretary also seeks a permanent injunction against Defendants prohibiting them from acting as fiduciaries to any employee benefit plan covered by ERISA and from violating the provisions of Title I of ERISA.

Courts have discretion to award injunctive relief under ERISA when serious violations of ERISA have occurred. Beck v. Levering, 14 EBC 1561, 1562-63 (2d Cir. 1991), cert. denied, 504 U.S. 909 (1992). Accord: Whitfield, 682 F. Supp. at 1306-07. In this case, the wrongful diversion of employees' monies, thereby causing the loss of their health insurance and their 401(k) Plans, and the conversion of these monies for use for corporate expenses, constitutes stealing from these employees. A permanent injunction is appropriate in this case.

III. CONCLUSION

For the foregoing reasons, the Secretary's Motion for Summary Judgment [doc. #28 is GRANTED IN PART AND DENIED IN PART. Defendants are liable to restore to the 401(k) Plan and/or the individual employees the employee contributions that were not forwarded to the Trustee in the amount of $11,414.38. Prejudgment interest is awarded at the rate set by the Secretary of the Treasury pursuant to 26 U.S.C. § 6621. Defendants are GRANTED summary judgment on the Secretary's claim for reimbursement of Klein's medical expenses. Defendants are hereby permanently enjoined from violating the provisions of Title I of ERISA or acting as fiduciaries to any employee benefit plan covered by ERISA.

The Secretary shall file a proposed judgment incorporating the amount of prejudgment interest on the withheld employee contributions and the costs incurred in prosecuting this action.

SO ORDERED.

Dated at New Haven, Connecticut, March 21, 1997.

/s/

Peter C. Dorsey
Chief United States District Judge

APPENDIX B

DC Docket: 94-cv-2069
DC Judge: DORSEY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERIAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of May one thousand nine hundred and ninety-eight.

PRESENT:

Hon. John M. Walker, Jr.,
Hon. Guido Calabresi,
Circuit Judges.

Hon. Jane A. Restani,*
Judge.

ALEX M. HERMAN, Secretary of Labor,
United States Department of Labor,

Plaintiff-Appellee,

v. No. 97-6100

ALBERT COOK and MICHAEL COOK,

Defendants-Appellants.

APPEARING FOR APPELLANTS: Albert Cook, Pro se
Sturbridge, MA

Michael Cook, Pro se
Worcester, MA

APPEARING FOR APPELLEE: Gail Ann Perry,
Trial Attorney, United States Department of Labor, Office of the Solicitor, Plan Benefits Security Division
J. Davitt McAteer, Acting

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* The Honorable Jane A. Restani, United States Court of International Trade, sitting by designation.

Solicitor of Labor; Marc I. Machiz, Associate Solicitor, Plan Benefits Security Division; Karen L. Handorf, Counsel for Special Litigation, on the brief) Washington, DC

Appeal from the United States District Court for the District of Connecticut Peter C. Dorsey, District Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED.

In March 1995, plaintiff-appellee, the Secretary of Labor commenced this action against defendants-appellants Albert Cook, and his son, Michael Cook, charging them with breach of fiduciary duty in violation of the Employee Retirement Income Security Act ("ERISA"). In March 1996, the Secretary moved for summary judgment. On March 21, 1997, the United States District Court for the District of Connecticut Peter C. Dorsey, District Judge) granted the Secretary's motion in part and denied it in part. Defendants-appellants, appearing pro se, appeal, arguing that: (1) the existence of genuine issues of material fact preclude summary judgment; (2) the Secretary lacked standing; (3) Judge Dorsey's ruling was inconsistent with the facts and the law; and (4) Judge Dorsey's ruling was in error as a matter of law. In addition,

and for the first time, defendants-appellants argue that the district court's prejudice required recusal.

Reviewing the record de novo, we agree with the district court's judgment for substantially the reasons stated in its opinion and hold that its judgment was not erroneous. See Ryan v. Grae & Rybicki, P.C., 235 F.3d 867, 869 (2d Cir. 1998) (district court's award of summary judgment reviewed de novo drawing all inferences and resolving all ambiguities in favor of the non-moving party). We note that the defendants-appellants did not raise the recusal issue in the district court, and generally we will not consider an issue raised for the first time on appeal. See Duamutef v. O'Keefe, 98 F.3d 22, 25 (2d Cir. 1996).

We have considered appellants' other arguments on appeal, and find them to be without merit.

For the reasons set forth above, the judgment of the district court is AFFIRMED.

FOR THE COURT:

/s/_____
GEORGE LANGE III, Clerk
by: Lucille Carr, Deputy Clerk